

Exhibit 5

COURT REPORTERS
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Transcript of the Testimony of
Todd Rhett Hawkins

Taken On: August 19, 2008

Case Number: 2:06-CV-2141-DGC

Case: Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

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<p style="text-align: center;">1</p> <p style="text-align: center;">IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF ARIZONA</p> <p>SOILWORKS, LLC, an Arizona) corporation,) Plaintiff/Counterdefendant/) CASE NO. Counterclaimant,) 2:06-CV-2141-DGC vs.) MIDWEST INDUSTRIAL SUPPLY,) INC., an Ohio corporation) ATTORNEYS' EYES authorized to do business) ONLY PORTIONS in Arizona,) CONTAINED WITHIN Defendant/Counterclaimant/) Counterdefendant.)</p> <p style="text-align: center;">- - -</p> <p>Videotaped deposition of TODD RHETT HAWKINS, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Mary Lyn Uphold, a Registered Diplomate Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the offices of Court Reporters of Akron, Canton and Cleveland, 221</p>	<p style="text-align: right;">3</p> <p style="text-align: center;">I N D E X</p> <p>1</p> <p>2</p> <p>3</p> <p>4 EXAMINATION 4</p> <p>5</p> <p>6</p> <p>7 Plaintiff's Exhibit 1 47</p> <p>8 Plaintiff's Exhibit 2 49</p> <p>9 Plaintiff's Exhibit 3 51</p> <p>10 Plaintiff's Exhibit 4 53</p> <p>11 Plaintiff's Exhibit 5 54</p> <p>12 Plaintiff's Exhibit 6 63</p> <p>13 Plaintiff's Exhibit 7 83</p> <p>14 Plaintiff's Exhibit 8 84</p> <p>15 Plaintiff's Exhibit 9 89</p> <p>16 Plaintiff's Exhibit 10 129</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: center;">2</p> <p>1 Springside Drive, Akron, Ohio, on Tuesday, the 2 19th day of August, 2008, commencing at 9:31 3 o'clock a.m.</p> <p>4 - - -</p> <p>5 APPEARANCES:</p> <p>6</p> <p>7 On Behalf of the Plaintiff:</p> <p>8 KUTAK ROCK LLP</p> <p>9 BY: E. Scott Dosek, Attorney at Law</p> <p>10 Suite 300</p> <p>11 8601 North Scottsdale Road</p> <p>12 Scottsdale, Arizona 85253-2742</p> <p>13 480/429-5000</p> <p>14</p> <p>15 On Behalf of the Defendant:</p> <p>16 BROUSE McDOWELL</p> <p>17 BY: John M. Skeriotis, Attorney at Law</p> <p>18 388 South Main Street, Suite 500</p> <p>19 Akron, Ohio 44311-4407</p> <p>20 330/535-9999</p> <p>21</p> <p>22 Also Present:</p> <p>23 Bob Vitale</p> <p>24 Jim Torok, Videographer</p> <p>25 - - -</p>	<p style="text-align: right;">4</p> <p>1 THE VIDEOGRAPHER: We are on the 2 record.</p> <p>3 TODD RHETT HAWKINS</p> <p>4 of lawful age, a witness herein, having been 5 first duly sworn, as hereinafter certified, 6 deposed and said as follows:</p> <p>7 EXAMINATION</p> <p>8 BY MR. DOSEK:</p> <p>9 Q. State your full name, please.</p> <p>10 A. Todd Rhett Hawkins.</p> <p>11 Q. And what is your date of birth?</p> <p>12 A. January 21st, 1962.</p> <p>13 Q. Mr. Hawkins, have you ever had your 14 deposition taken before?</p> <p>15 A. No.</p> <p>16 Q. Have you ever testified in court before?</p> <p>17 A. No.</p> <p>18 Q. Have you ever testified under oath in any 19 kind of proceeding prior to today?</p> <p>20 A. Possibly. I am not sure. Maybe during my 21 divorce. I mean, I may have. I am not sure if 22 you have to do that or not.</p> <p>23 Q. Okay. Did you have to go to court for your 24 divorce?</p> <p>25 A. Magistrate.</p>

<p style="text-align: right;">121</p> <p>1 isoalkanes.</p> <p>2 Q. Forgive me if I asked you this before, but</p> <p>3 do you know what a "Mercury 300 NMR spectrometer</p> <p>4 test" is?</p> <p>5 A. It's a spectrometer test, but no, I do not</p> <p>6 know. I do not run those tests.</p> <p>7 Q. What is a "spectrometer test"?</p> <p>8 A. It gives you a reading of the composition</p> <p>9 of materials you are analyzing.</p> <p>10 Q. Have you ever done such a thing?</p> <p>11 A. No.</p> <p>12 Q. I am going to guess here that in order to</p> <p>13 run a spectrometer test, you need to have a</p> <p>14 spectrometer. Is that true, to your knowledge?</p> <p>15 A. Yes.</p> <p>16 Q. Do you know what a "spectrometer" is?</p> <p>17 A. I've seen some, yes.</p> <p>18 Q. What is it? Is it bigger than a bread box?</p> <p>19 A. Yes.</p> <p>20 Q. When you were an employee of Midwest</p> <p>21 Industrial Supply, was there a spectrometer at</p> <p>22 Midwest?</p> <p>23 A. No.</p> <p>24 Q. Have you ever conducted a spectrometer</p> <p>25 test?</p>	<p style="text-align: right;">123</p> <p>1 upon -- same objection I lodged in the prior</p> <p>2 depositions, that with respect to any testing</p> <p>3 that's been done pursuant to an attorney or not,</p> <p>4 we maintain the attorney work product.</p> <p>5 If there was any testing done prior</p> <p>6 to any attorney being involved and prior to this</p> <p>7 litigation, you are free to answer that</p> <p>8 question.</p> <p>9 MR. DOSEK: I don't think there</p> <p>10 is any work product in January of '05, John.</p> <p>11 MR. SKERIOTIS: You didn't limit it</p> <p>12 to January '05.</p> <p>13 MR. DOSEK: Well, January '05</p> <p>14 is the time that this exhibit was prepared,</p> <p>15 Exhibit 23.</p> <p>16 THE WITNESS: I am thoroughly</p> <p>17 confused now.</p> <p>18 BY MR. DOSEK:</p> <p>19 Q. Okay.</p> <p>20 A. If you would re --</p> <p>21 Q. Fine, we will back up.</p> <p>22 As of January '05, are you aware of any</p> <p>23 chemical analysis or any other kind of analysis</p> <p>24 that had been performed by or on behalf of</p> <p>25 Midwest Industrial Supply with respect to the</p>
<p style="text-align: right;">122</p> <p>1 A. Personally, no.</p> <p>2 Q. Do you know if anyone else at Midwest</p> <p>3 Industrial Supply ever did?</p> <p>4 A. I don't know.</p> <p>5 Q. So if I can just kind of go back and</p> <p>6 summarize a little bit with respect to</p> <p>7 Exhibit 23, in the first two pages, which</p> <p>8 constitutes essentially a letter to the Patent</p> <p>9 and Trademark Office, correct?</p> <p>10 A. Correct.</p> <p>11 Q. And that letter was written because it was</p> <p>12 the feeling of the applicant, in January of '05,</p> <p>13 or the belief of the applicant in January of</p> <p>14 '05, that there was an infringing device or</p> <p>15 product actually on the market, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And that one of those products was the</p> <p>18 Soilworks Durasoil product?</p> <p>19 A. Yes.</p> <p>20 Q. For which no chemical testing or analysis</p> <p>21 had been done by you at that point, correct?</p> <p>22 A. I personally had not done any chemical</p> <p>23 analysis.</p> <p>24 Q. Are you aware of any that had been done?</p> <p>25 MR. SKERIOTIS: Objection, based</p>	<p style="text-align: right;">124</p> <p>1 Durasoil product?</p> <p>2 MR. SKERIOTIS: Same objection. I</p> <p>3 mean, if, in fact, some testing was done, it</p> <p>4 would be in anticipation of litigation. So to</p> <p>5 the degree that your objection is -- I mean, it</p> <p>6 clearly references "allegedly infringing</p> <p>7 product," and should Midwest have received the</p> <p>8 patent as these claims were drafted on page 3, I</p> <p>9 would assume litigation would be anticipated;</p> <p>10 and therefore, I would maintain the objection.</p> <p>11 And if, in fact, any of your response</p> <p>12 would be that any testing or not was done with</p> <p>13 an attorney present, then I instruct you not to</p> <p>14 answer that question, unless you have knowledge</p> <p>15 prior to any attorney being involved, of any</p> <p>16 testing done.</p> <p>17 THE WITNESS: I have no knowledge</p> <p>18 of any testing being done without the attorney</p> <p>19 being present.</p> <p>20 BY MR. DOSEK:</p> <p>21 Q. Do you have knowledge of testing being done</p> <p>22 with an attorney present?</p> <p>23 MR. SKERIOTIS: Objection.</p> <p>24 Instruct you not to answer. Same objection.</p> <p>25 MR. DOSEK: And you are</p>

<p style="text-align: right;">125</p> <p>1 claiming that whether or not he knows whether 2 there was any testing done by any lawyer is 3 privileged? 4 MR. SKERIOTIS: Yes. It's attorney 5 work product, absolutely. Because then you 6 would know whether or not any testing was done. 7 And that whether or not any attorney did any 8 testing on any product pursuant to this 9 litigation in anticipation thereof is absolutely 10 privileged. 11 MR. DOSEK: And you're -- 12 MR. SKERIOTIS: And that's the same 13 objection, Scott, I've noted in the Detloff 14 deposition and the Vitale deposition as well, 15 and I have never been questioned until today. 16 So -- 17 MR. DOSEK: Well, just because 18 you haven't been questioned doesn't mean that 19 your objection is not ill founded, because it 20 is, John, particularly when you are talking 21 about something that is in the time frame of 22 January of '05, a year and a half before any of 23 the -- before the patent was issued, before any 24 of this -- 25 MR. SKERIOTIS: Sure.</p>	<p style="text-align: right;">127</p> <p>1 an argument that your letters to Polar Supply in 2 the summer of '06 did not constitute threats of 3 litigation, is that what you are saying? 4 MR. SKERIOTIS: That's exactly what 5 I am saying, with one caveat. 6 MR. DOSEK: Okay. 7 MR. SKERIOTIS: If you would take a 8 look, Scott, at page 3, the claim at issue is "A 9 compound for chemical soil stabilization and 10 dust control, the compound comprising: a 11 synthetic isoalkane," period. If that claim 12 were to have issued, that is exactly my 13 position. 14 BY MR. DOSEK: 15 Q. Are you aware of any chemical analysis or 16 testing that has been done with respect to the 17 Durasoil product? 18 MR. SKERIOTIS: Same objection. 19 Other than if an attorney was working on it -- 20 THE WITNESS: Same answer as I 21 gave before. 22 MR. DOSEK: And you are saying, 23 John, that whether he knows if any such testing 24 has even been done -- I am not asking him for 25 the results of any such testing -- whether he</p>
<p style="text-align: right;">126</p> <p>1 MR. DOSEK: -- controversy ever 2 arose. 3 MR. SKERIOTIS: You are absolutely 4 true. 5 MR. DOSEK: That is akin to an 6 insurance company claiming work product whenever 7 it drafts an insurance policy, because there may 8 be litigation about the insurance policy. 9 And, John, you know as well as I do 10 that the attorney work product doctrine does not 11 extend that far. 12 MR. SKERIOTIS: And I think we 13 disagree with respect to patent cases, 14 especially where you've got a document, Scott, 15 that says that they believe that there is a 16 product that is being infringed. How that's not 17 in anticipation of litigation is beyond question 18 to me. 19 So I am maintaining the objection and 20 you are welcome to disagree with it. 21 MR. DOSEK: All right. Just so 22 I am clear then, you are saying that this, in 23 January of '05, constitutes something that is in 24 anticipation of litigation, even though you 25 filed, in your motion to dismiss this lawsuit,</p>	<p style="text-align: right;">128</p> <p>1 knows whether any such testing has been done is 2 privileged and work product? 3 MR. SKERIOTIS: If an attorney was 4 present, correct. You can ask him that 5 question, if an attorney wasn't present, if it 6 was done, yeah. That's exactly what I am 7 saying. 8 BY MR. DOSEK: 9 Q. The question was, are you aware of any 10 testing that's been done, chemical testing of 11 the Durasoil product, by anybody? 12 MR. SKERIOTIS: Same objection. 13 THE WITNESS: Same answer. Not 14 without the attorney present. 15 BY MR. DOSEK: 16 Q. So you are aware of testing of the Durasoil 17 product that was done under the supervision of 18 lawyers; is that correct? 19 MR. SKERIOTIS: Objection. Again, 20 he already asked and answered this question 21 already. So, I mean, to the degree you got your 22 answer, you got your answer. Let's move on. 23 You are just asking the same question a 24 different way. 25</p>